



## Agreements between an Electronic Marketplace and Its Members

MICHAEL R. GEROE\*

As companies doing business on the Internet continue to look for ways to distinguish themselves and become more valuable to their users, a number of them are deciding to add the use of auction services to their existing Web site(s). Often referred to as *B2B marketplaces* or *trading hubs*, these services are a practical way to build a site's sticky applications. They keep users coming back to find out what new goods or services are being offered, or they help users to sell their own goods or services. There is an obvious synergy to adding auction functionality to the Web site of businesses engaged in the export-import sector, and it would not be surprising to see more of these sites add electronic marketplaces in the coming year.

Compelling economics are no small ingredient to the interest of adding auction services to Internet-based businesses. Electronic commerce (e-commerce) is growing at a dramatic pace because its use allows businesses to quickly reach customers from across the globe at a relatively low cost. Revenue generated by e-commerce is estimated to have been \$210 billion in 2000 and is projected to escalate notwithstanding the economic downturn of the technology sector. By 2004, revenue is expected to rise to as much as \$2.7 trillion in the United States, \$1.6 trillion in the Asia-Pacific region, and \$1.5 trillion in Europe.<sup>1</sup> Already, billions of electronic transactions are annually executed by global 2000 companies. The B2B marketplace, as a vital component of this surge in electronic business, will play an important role in the modification of the way in which businesses buy, sell, and advertise goods and services to each other (and to consumers) in the coming years.

There are many legal considerations to be addressed by a business seeking to add an electronic marketplace to its Web site. When an electronic marketplace is added to a site, it is important to reevaluate whether the site's existing agreement(s) with its users suffi-

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\*Michael R. Geroe is a partner in the Washington, DC, office of Williams, Mullen, Clark & Dobbins, counseling clients on international technology-related transactions and compliance matters. The author thanks Andrew M. Abrams for his research assistance in the preparation of this article. The views expressed in this article are solely those of the author and do not necessarily reflect the views of Williams, Mullen, Clark & Dobbins or its clients.

1. Betty Spence, *E-Day, CEO E-Conference Report: Strategic B2B: Creating New Economy Growth and Profit*, CHIEF EXECUTIVE (2001), at 2, available at [www.chiefexecutive.net/ceoguides/e-report/index.html](http://www.chiefexecutive.net/ceoguides/e-report/index.html) (last visited Oct. 9, 2001).

ciently cover liabilities that may arise in the course of the marketplace's use. For example, what happens if a seller fails to ship goods purchased through the marketplace or ships to an incorrect address? What if a buyer fails to pay a seller for goods shipped? What impact, if any, should the marketplace have on the site's privacy policy? These are only some of the issues that should be addressed for an Internet business offering auction services. This article is a primer for executives of Internet-based businesses and their legal counsel, providing basic issues to be addressed in an agreement between an Internet-based electronic marketplace and its users (the agreement). Unless stated otherwise, the article assumes an electronic marketplace based on the model popularized by E-Bay, which is relatively easy to establish and maintain.<sup>2</sup>

## **I. Liability, Availability, Notice Disclaimers, Compliance, Dispute Resolution, and Termination Should Be Addressed in Every Agreement**

### **A. LIMITATION OF LIABILITY AND INDEMNIFICATION**

One of the first concepts that the agreement should address is that an electronic marketplace is merely and solely a venue for buyers and sellers to identify each other and agree to terms of trade. In other words, the auction site is nothing more than a venue bringing together buyers and sellers of goods and services. Responsibility for creditworthiness of the buyers or reliability of the sellers should be explicitly disclaimed. This disclaimer should include standard language about the auction services being provided on an as-is basis. As discussed later, the electronic marketplace should further disclaim any responsibility for the accuracy of the postings made by its users.

In addition to the disclaimers referenced above, the agreement should have strong limitation of liability and indemnification clauses. As a condition of joining an auction site, registrants should agree that neither the auction site (or its affiliates) nor its management are liable for damages or expenses arising from use of the electronic marketplace, termination of membership, failure of performance on the part of other electronic marketplace participants, unanticipated government actions, or other events. The agreement should further require each registrant to defend and hold the electronic marketplace and its management harmless against claims arising from a registrant's use of the electronic marketplace.<sup>3</sup>

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2. There are a number of models through which an electronic marketplace may be developed, operated, and analyzed. Two broadly acknowledged categories are public exchanges, in which a group of stakeholders fund and own an electronic marketplace (even though the marketplace itself may be a separately incorporated entity), and private exchanges, in which an electronic marketplace is captive to one business or creator. For example, a group of purchasers may form an electronic marketplace through which they centralize their supply procurement. Among the first and better-known public exchanges is Covisint, which is owned by automobile manufacturers hoping to drive down the cost of their parts and supplies. Electronic marketplaces may also be analyzed as serving vertical or horizontal markets. The former indicates a site provides a marketplace of goods and services to businesses at various and multiple points in the supply chain of an industry (e.g., manufacturers and distributors); the latter suggests a marketplace focusing on the sale of specific types of goods and services across different industries (e.g., the trading of plastics, steel, natural gas, etc.). In addition to Covisint, examples of other well known exchanges on the Web include FreeMarkets, E-Steel, EnronOnline, and GE Polymerland; for an example of a recent start-up electronic marketplace, see TradeLion, at [www.tradelion.com](http://www.tradelion.com).

3. Those electronic marketplaces that are designed primarily for use by and between non-commercial consumers should also be mindful of the Uniform Computer Information Transactions Act (UCITA). See [www.](http://www.)

In short, the agreement should seek to explicitly remove a Web site from liability for the transactions occurring through the electronic marketplace. If the Web site does not involve itself in the actual transactions occurring through the electronic marketplace (such as arranging shipment, guaranteeing payment, confirming addresses, and so on), the auction participants should release the Web site and its management from liability connected with transactions occurring on the electronic marketplace.<sup>4</sup> While this may sound extreme, it is neither unprecedented nor unreasonable. Although no meaningful case law at this time addresses the ability of electronic marketplaces to limit liability through the use of disclaimers, guidance through analogy may be drawn from cases addressing traditional auctions. For example, judicial precedent holds that in the absence of evidence of willful intent to deceive, where an auction catalog lists the terms of sale and contains a clear, unequivocal disclaimer of any express or implied warranty of genuineness, a buyer assumes the risk as to the genuineness of the good purchased.<sup>5</sup> Furthermore, there is long established precedent for the principle that when an auctioneer discloses the identity of his or her principal to the buyer, no liability rests on the auctioneer for a breach of warranty of quality.<sup>6</sup> There is consequently reason to believe that courts will recognize liability disclaimers issued by an electronic marketplace with regard to sales transactions executed through the marketplace. Broadly stated, suing an electronic marketplace for a dispute arising from a transaction that occurred on the site may be similar to filing a claim against the New York Stock Exchange for a dispute arising from the purchase of a stock listed on the exchange. Unless an allegation of fraud or bad faith on the part of an exchange or marketplace is proven, a claim is unlikely to be sustained.<sup>7</sup>

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ucitaonline.com. The UCITA has been adopted as law in Maryland and Virginia and is pending enactment elsewhere. The UCITA is among the first uniform contract laws designed to specifically address the information economy.

Transactions in computer information involve different expectations, industry practices, and policies from transactions in goods. For example, in a sale of goods, the buyer owns what it buys and possesses exclusive rights in that good. In contrast, someone that acquires a copy of computer information may or may not own that copy but in any case rarely obtains all rights associated with the information. See *DSC Communications Corp. v. Pulse Communications, Inc.*, 170 F.3d 1354 (D.C. Cir. 1999). In any event, the UCITA steps into the vacuum governing the provision of services that exists in article 2 of the Uniform Commercial Code. Article 2 is limited to the sale of goods. A full discussion of the UCITA is beyond the scope of this article; suffice it to state here that the UCITA is aimed at consumer protection more than transactions between business parties. Such parties are presumed to be more sophisticated and have more resources to allocate risk between each other. The UCITA provides, among other things, implied warranties of non-infringement, quiet enjoyment, fitness for a particular purpose, system integration, and data accuracy. See UCITA §§ 401, 404, and 405, available at [www.law.upenn.edu/bll/ulc/ucita/ucita01.htm](http://www.law.upenn.edu/bll/ulc/ucita/ucita01.htm) (last visited Oct. 9, 2001). These implied warranties are limited in scope and, more importantly, may be properly disclaimed by the service provider.

4. A sophisticated electronic marketplace may provide additional services related to underlying transactions such as coordinating with shipping vendors or undertaking some advanced creditworthiness review of registrants prior to granting them membership in the electronic marketplace. Such services may be provided with the hope that they will increase use of the electronic marketplace. In such instances, while it may not be possible to disclaim total liability, it is important that the risks and liabilities are clearly defined and, with respect to the client, limited to the extent possible.

5. See, e.g., *Weisz v. Parke-Bernet Galleries, Inc.*, 351 N.Y.S.2d 911 (1974).

6. See, e.g., *Hayes v. D. P. S. Nichols Co.*, 64 Pa. Super. 273 (1916).

7. See, e.g., *Walck v. American Stock Exch., Inc.*, 687 F.2d 778, 780 (3d Cir. 1982); *Brawer v. Options Clearing Corp.*, 807 F.2d 297, 302 (2d Cir. 1986), *cert. denied*, 484 U.S. 819 (1987).

## B. AVAILABILITY OF THE ELECTRONIC MARKETPLACE SHOULD NOT BE GUARANTEED

A prudently drafted agreement will disclaim any obligation to be available for a regular or predictable period. That is, the participants in the marketplace should bear the risk of any disruptions caused by the site's going down for unanticipated reasons. The agreement may state that (reasonable) efforts will be made to maintain the electronic marketplace's availability on a continuing and ongoing basis (with allowances for regular maintenance) but that the results of such efforts are not guaranteed. Such disclaimers are common for providers of digital and Internet services, and the caveat included in the agreement between an electronic marketplace and its members may be patterned after examples from those arenas. A standard type of disclaimer used by an Internet service provider may state as follows:

You understand and agree that [the provider] does not warrant the service to be uninterrupted or error-free. You further understand and agree that [the provider] has no control over third party networks or Web sites that you may access in the course of your use of the service, and that delays and disruptions of other network transmissions are completely beyond the control of [the provider]. [The provider] cannot and will not guarantee that the service will provide Internet access that meets your needs.<sup>8</sup>

## C. RESPONSIBILITY FOR RELIABILITY OF THE NOTICES AND OTHER INFORMATION POSTED TO THE ELECTRONIC MARKETPLACE SHOULD BE DISCLAIMED

The agreement should at a minimum disclaim any responsibility for the reliability of postings to the electronic marketplace. The agreement can further protect an auction site by invoking contractual terms that prohibit improper or illegal activity, such as the sale of stolen goods or goods that infringe on any intellectual property rights (for example, trademarks, copyrights, or patents). Will explicitly stating such prohibitions prevent someone from offering to sell stolen goods on the site? Perhaps, though this is not the sole consideration or intent. Such terms in the agreement would likely be used to a Web site's advantage if the site unexpectedly finds itself in court as a party to a suit involving the sale of stolen goods or goods infringing upon third-party intellectual property rights.

1. *Disclaimer Regarding Accuracy of Postings and Content*

Numerous lines of cases underline the importance of explicit contractual disclaimers limiting liability for the content and accuracy of postings; the following few examples should suffice. In the United States, online information providers are generally insulated from liability for defamatory material made available through their online services.<sup>9</sup> In *Cubby*,

8. See *Scott v. Bell Atlantic Corp.*, slip op. 600591/00 (N.Y. Sup. Ct. Oct. 12, 2000), available at [www.courts.state.ny.us/nycdlr/issue3-5/Scott.htm](http://www.courts.state.ny.us/nycdlr/issue3-5/Scott.htm) (Disclaimer used in service agreement between Bell Atlantic Internet Solutions and its customers; note that under the circumstances, the disclaimer was found insufficient to warrant grant of summary judgment in favor of the defendant).

9. Outside of the United States, liability for content of items placed on an electronic marketplace is a serious issue of concern for operators of the marketplace. The U.S. Internet-based business Yahoo operates auction services for use by its members around the world. Some of the goods traded on its auctions included Nazi propaganda items. The French Penal Code prohibits the display of objects representing symbols of Nazi ideology. Notwithstanding the fact that Yahoo's servers were in the United States (in California), the County

*Inc. v. CompuServe, Inc.*,<sup>10</sup> a New York federal district court reasoned that because technology was rapidly transforming the information industry, a computerized database was the functional equivalent of a more traditional news vendor. It determined that the application of a lower liability standard for an electronic news distributor than the standard applied to a public library, bookstore, or newsstand would impose an undue burden on the free flow of information.<sup>11</sup> Additionally, in *Daniel v. Dow Jones & Co., Inc.*,<sup>12</sup> a court rejected an online subscriber's claim against the defendant information provider based on an alleged error in the presentation of information concerning the price of a reported commercial transaction. A third noteworthy case on this subject concerns the provider of a stock index whose function was to serve as the basis for trading on the Chicago commodities exchange.<sup>13</sup> On one occasion, the provider made an erroneous calculation of the index, causing significant financial loss to many who had traded based on the false figure. The Illinois court hearing the dispute held that the doctrine of negligent misrepresentation created potential liability claims for all users of the index as a trading measure against the defendant but that in this case the liability was disclaimed by the germane contractual agreement.<sup>14</sup> In support of this case law, the recently promulgated Uniform Computer Information Transactions Act (UCITA) expressly denies the existence of any implied warranty with regard to published informational content on the Internet.<sup>15</sup>

## 2. Disclaimers Pertaining to Stolen Goods

Courts may look to the law governing traditional auctions as a guide in developing a common law of how to treat stolen goods traded in an electronic marketplace. The overwhelming weight of authority reflects that an auctioneer who sells property on behalf of a principal who has no right to sell such property is personally liable to the true owner for conversion regardless of whether the auctioneer had knowledge, actual or constructive, of the principal's lack of title.<sup>16</sup> An exception to this rule is generally made only when facts creating an estoppel can be presented or when a showing can be made of acquiescence or consent on the part of the true owner.<sup>17</sup> If electronic markets are treated analogously to

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Court of Paris found that because Yahoo maintained a site aimed at the people of France (e.g., French language advertisements and content), it had jurisdiction to hear the case filed in that court against Yahoo. The court found Yahoo in violation of the French Penal Code. It issued a judgment requiring Yahoo to screen for French users of its auction site and to block their ability to view items related to Nazi ideology; it further imposed the threat of a fine of 100,000 francs per day if compliance was not diligently undertaken. *League against Racism and Anti-Semitism v. Yahoo! Inc.*, slip op. RG 00/05308 (County Court of Paris, Nov. 20, 2000) (abstract available at [www.2001law.com/documents/docs\\_459\\_54.htm](http://www.2001law.com/documents/docs_459_54.htm)).

An earlier closely followed case concerned the May 1998 conviction of the former CEO of CompuServe Germany. He was found criminally guilty by the Munich Administrative Court for complicity in 13 cases of distributing Internet pornography as a result of a failure to block CompuServe customer access to a variety of Internet sites. Although the original conviction was handed down with a 2-year prison term, the prison term was eventually suspended on appeal. *In Re Felix Bruno Somm*, 8340 Ds 465 Js 173158/95 (Local Court [Amtsgericht] Munich 1998) (English translation may be viewed at [www.cyber-rights.org/isps/somm-dec.htm](http://www.cyber-rights.org/isps/somm-dec.htm)).

10. 776 F. Supp. 135 (S.D.N.Y. 1991).

11. *See id.* at 140.

12. 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987).

13. *Rosenstein v. Standard & Poor's Corp.*, 636 N.E.2d 665, 666 (Ill. App. Ct. 1993).

14. *See id.* at 672.

15. UCITA § 404(b)(1).

16. *See, e.g., House of CM of Denver, Inc. v. Baldwin Auction Co.*, 480 P.2d 605 (Colo. Ct. App. 1970); *Hills Bank & Trust Co. v. Arnold Cattle Co.*, 316 N.E.2d 669 (Ill. App. Ct. 1974); *Ottumwa Production Credit Ass'n v. Keoco Auction Co.*, 347 N.W.2d 393 (Iowa 1984).

traditional auctions, even the innocent sale of stolen goods through the electronic marketplace could lead to liability for the principals of the electronic marketplace. However, as discussed above, when an auction provides a clear, unequivocal disclaimer of any express or implied warranty of genuineness and there is no evidence of a willful intent to deceive, the purchaser assumes the risk as to the genuineness of the item(s) purchased.<sup>18</sup> Consequently, in addition to explicitly stating a prohibition against stolen goods, businesses creating an electronic marketplace should include an adequate disclaimer of liability with regard to the possible sale of such illegal goods.

### 3. *Best Efforts Should Be Made to Respect Intellectual Property Rights*

Respect for and protection of intellectual property rights is as much prudent business as it is a strategic legal consideration; as briefly addressed here, there are a variety of dimensions on which intellectual property issues arise. A business operating an electronic marketplace should make reasonable efforts to prohibit offering illegal or infringing items on the marketplace and should state in its agreement that it does not tolerate or condone any activity infringing upon intellectual property rights.

#### a. Actual Rather Than Constructive Knowledge of Infringement Is a Likely Standard for Liability

The operator of an electronic marketplace using reasonable caution and operating on a good faith basis should not be legally responsible for the intellectual property infringements of its users. As long as the business does not continue to offer a good on its electronic marketplace while in possession of actual knowledge that the offered good is in violation of intellectual property laws,<sup>19</sup> the site should not be held liable for contributory infringement. Outside of the Internet space or a similar online electronic environment, one who induces, causes, or materially contributes to the infringing conduct of another with knowledge or reason to know of an activity infringing upon intellectual property rights may be held liable as a contributory infringer.<sup>20</sup> In an online environment, however, evidence of actual, rather than merely constructive, knowledge of specific acts of infringement is required to hold a computer system operator liable for contributory copyright infringement.<sup>21</sup> Absent any specific information that identifies infringing activity, a computer system operator is not liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material.<sup>22</sup>

In *Religious Technology Center v. Netcom On-Line Communication Services*,<sup>23</sup> the federal district court found that the defendant was not liable for direct infringement because it did not "create or control the content of the information available to its subscribers"; rather, it provided "access to the Internet, whose content is controlled by no single entity."<sup>24</sup> Elec-

17. *House of CM of Denver*, 480 P.2d at 606.

18. *Weisz v. Parke-Bernet Galleries, Inc.*, 351 N.Y.S.2d 911 (1974).

19. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (defendant found to offer goods while in possession of actual knowledge that the offered goods infringed intellectual property rights).

20. See *id.* at 1020; *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); see also *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

21. See *Religious Tech. Ctr. v. Netcom On-Line Communications Servs.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995).

22. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 436, 442-43 (1984).

23. 907 F. Supp. 1361.

24. *Id.* at 1372.

tronic marketplaces are similar to the defendant in *Religious Technology Center* as they simply provide auction services; a site should not claim to actively regulate or control the goods and services made available on the electronic marketplace.<sup>25</sup>

Discussion in the agreement of permissible and impermissible (that is, infringing) postings may also address practical business issues that do not squarely fall within the scope of intellectual property protection. For example, must postings to the electronic marketplace be exclusive to the site? That is, should a client permit a seller to simultaneously offer a product for sale on its site and a third-party electronic marketplace? What if a posting to sell a product refers interested buyers to another Web site? Such activity may be considered objectionable by management. The policies contemplated after asking such questions should be balanced against the nature of the Web site and the specific industries involved to determine whether additional legal issues, including antitrust risks (described briefly in the following section), are raised.

**b. The Agreement Should Grant a Nonexclusive License of a Registrant's Trademark and Secure the Right to Advertise Transaction-Related Data**

There are a number of other intellectual property and related privacy issues to consider. What if management decides to advertise or highlight items listed in the electronic marketplace on other areas of its Web site to help increase traffic of the auction site and the Web site? A business specializing in wireless technology, for example, may want to advertise the fact that a large quantity of a particular model of cell phones are available for purchase on its auction site. Similarly, management may wish to increase use of its auction site by highlighting well known members/users (for example, Fortune 500 companies) of the auction site. More generally, the electronic marketplace may want to collect and advertise aggregate data about itself (for example, advertising that over 10,000 widgets are auctioned every day!). The agreement and/or a Web site's privacy policy should anticipate such plans and notify registrants that data collected in connection with the electronic marketplace's operation, the names of registrants, or particular items being offered on the site may be advertised or otherwise provided to third parties. Depending on how publicity is to be handled, it may be useful to have a registrant consent in the agreement to grant the electronic marketplace a nonexclusive license of the registrant's trademark or other intellectual property for advertising purposes. This language should be drafted with care to re-enforce the point that intellectual property rights shall be honored by all users of the auction site, including management.

**D. APPLICABLE LAWS, REGULATIONS, AND POLICIES SHOULD BE ADDRESSED**

Management should be mindful of basic demographics about the anticipated users of the auction site. Are users restricted to persons or businesses within a particular state or country? If not, are the goods and services likely to be sold through the site subject to regulation (including European privacy regulation) or export control laws? The answer will depend on what is being sold (chemicals, technology) and where the sales are occurring. The United States imposes trade sanctions in many parts of the world (for example, Asia, Europe, and

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25. An auction site may reference a policy of prohibiting the trade of pornographic media, or Nazi-related goods; statement of such a policy, however, should be distinguished from making the commitment to monitor or censor every item offered for sale on the electronic marketplace at all times.

the Middle East). If a client or its registrants do business in Europe, awareness of the European Commission Directive on Data Protection<sup>26</sup> and the related U.S. Safe Harbor Privacy Principles<sup>27</sup> are recommended.

An international inter-government effort is underway to streamline international jurisdictional issues pertaining to electronic commerce, particularly as it relates to business-to-consumer transactions. The U.S. Federal Trade Commission (FTC) is coordinating with foreign agencies on behalf of the United States to foster electronic commerce by improving consumer confidence in using the Internet. Currently, these efforts have identified two predominant types of jurisdictional systems proposed to create a viable international electronic commerce framework. The *country-of-destination* jurisdictional system, which permits a consumer to rely on the legal protections available in his or her country, is preferred by the FTC; the alternative is a *country-of-origin* or *prescribed-by-seller* rule, which subjects businesses solely to the laws and the judicial systems of their own country or as prescribed by contract.<sup>28</sup> The UCITA, which applies to any transactions involving electronic information and informational rights, upholds virtually any choice-of-law and choice-of-forum provision.<sup>29</sup> While results from inter-governmental coordination will be long term, readers of this article are likely stakeholders in the outcome of these efforts, and may wish to contact the FTC to inform it of their own position on this important issue.

### 1. *Internet Taxation in the United States Is Curtailed but Not Eliminated by the U.S. Congress*

Additionally, there is the issue of whether some sales but not others will be subject to an Internet or sales tax. For now, it appears as though political pressure to avoid imposing new Internet taxes in the United States has prevailed in Congress. The Internet Tax Freedom Act of 1998 (ITFA)<sup>30</sup> imposed a three-year moratorium on certain state taxes on Internet access and electronic commerce.<sup>31</sup> The ITFA further established a commission to study and make legislative recommendations regarding taxation of Internet-related activities. The current Congress has introduced a bill to permanently extend the moratorium enacted by the ITFA, but as of this writing, the bill had not been passed into law.<sup>32</sup> Whatever Congress ultimately decides to do, the agreement should make a good faith effort to alert users to the existence of any relevant taxes and regulations and should obtain from the user a commitment to comply with them. This effort is consistent with the principle that the electronic

26. Council Directive 95/46/EC, 1995 O.J. (L 281) 31.

27. Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45,666 (July 24, 2000), available at [www.ita.doc.gov/ecom](http://www.ita.doc.gov/ecom).

28. The country-of-origin/prescribed-by-seller rule is advantageous for businesses because it provides a predictable regulatory environment and reduces compliance costs. It circumvents the need for businesses operating global electronic marketplaces from the need to master or comply with the regulations of nations in which they are not located even if customers of the electronic marketplaces reside in them. See Bureau of Consumer Protection, Federal Trade Commission, *Consumer Protection in the Global Electronic Marketplace* (Sept. 2000), available at [www.ftc.gov/bcp/icpw/lookingahead/lookingahead.htm](http://www.ftc.gov/bcp/icpw/lookingahead/lookingahead.htm).

29. UCITA § 102(45).

30. Pub. L. No. 105-277, 112 Stat. 2681 (1998).

31. The act prohibits (1) taxes on Internet access, (2) multiple taxes on electronic commerce, and (3) discriminatory taxes on electronic commerce (i.e., states cannot impose taxes on Internet sales by non-physically present sellers if the state relies solely on the purchaser's ability to access the seller's out-of-state computer server as a factor in deciding whether the seller has nexus with the state and, as a result, an obligation to collect a tax on the transaction.).

32. H.R. 1675, 107th Cong. (1st Sess. 2001).



marketplace is not responsible for the transactions occurring through it by serving to further insulate the client from liability in the event of litigation related to taxation matters. Should the electronic marketplace become a party to such a suit, counsel will likely want to point to contract language placing registrants on notice that payment of taxes may be called for in certain jurisdictions and further obtaining from each registrant a compliance commitment.

While there is no judicial precedent on the specific issue of Internet taxation, there is precedent on the ability of a state to collect taxes from a foreign vendor not present in the state. The U.S. Supreme Court determined in *Quill Corp. v. North Dakota*<sup>33</sup> that in order for a state to collect taxes from an out-of-state vendor with no physical presence in the state, it would have to satisfy both the "minimum contacts" test required by the due process clause and the stricter "substantial nexus" standard set by the commerce clause to the U.S. Constitution.<sup>34</sup> In *Quill Corp.*, the petitioner, a mail-order house with no outlets or representatives in the respondent's state, was nonetheless determined to have met the requirements for minimum contacts established by *International Shoe*<sup>35</sup> and its progeny by purposefully directing commercial activity toward the residents of North Dakota.<sup>36</sup> However, in part driven by public policy concerns about the effects of state regulation on the national economy, the Court held that the nexus requirement of the commerce clause<sup>37</sup> had not been met and reversed the lower court order requiring the petitioner to pay taxes.<sup>38</sup> Perhaps most significantly, the Court emphasized that Congress should have had the ultimate power to decide whether, when, and to what extent the states may burden interstate mail-order concerns with a duty to pay taxes.<sup>39</sup> Congress took such a step through its passage of the ITFA.

## 2. Antitrust-Related Considerations

In the United States, the joining together of business competitors in an industry for any business purpose raises antitrust issues. As the well publicized antitrust case against Microsoft Corporation illustrates, authorities continue to develop policy for the application of antitrust principles to the type of business transactions made possible by recent technological innovations. Turning to electronic marketplaces, antitrust compliance tends to be more complex for the development and maintenance of a public exchange than a private exchange.<sup>40</sup> The FTC has taken primary regulatory oversight of electronic marketplaces. It initiated a lengthy investigation, for example, into Covisint's development and operations shortly after the consortium of automobile manufacturers announced its creation. Whether a public exchange is perceived as a legitimate business operation or cartel created to fix prices and output will depend in significant part on a demonstration of whether the pro-competition aspects and effects of the electronic marketplace outweigh its anti-competitive aspects and effects. Cooperation with FTC staff and development of a compliance program are essential to the success of such an endeavor.

33. 504 U.S. 298 (1992).

34. *Id.* at 312-13.

35. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

36. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

37. As outlined in the four-part test set by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

38. *Quill Corp.*, 504 U.S. 298.

39. *Id.* at 318.

40. *See discussion, supra* note 2.

When a single business creates and maintains an electronic marketplace, the likelihood of violating federal antitrust law is diminished by the fact that the opportunity for collusive activity is reduced. While a comprehensive discussion of the antitrust implications of public and private electronic exchanges is beyond the scope of this primer, management should be mindful of activity on any exchange that arguably has anti-competitive effects. For example, competitors of a business may still use its private exchange by signing up as members. Consequently, the sharing of price, output, sales volume, and other information that a business would normally consider proprietary should not, in the first instance, be collected as part of a registration process.<sup>41</sup> Of course, in any auction marketplace, price and volume are ultimately displayed for all members on a transaction-by-transaction basis. This practice does not violate federal antitrust law. That does not mean, however, that the entrepreneurial plan of one's marketing team to use its new data-mining software to periodically aggregate on a member-by-member basis the transactions on one's electronic marketplace and sell it to the highest bidder would similarly survive antitrust scrutiny.<sup>42</sup> If there is reason to believe that legitimate business activities on an electronic marketplace will or may raise antitrust issues, the agreement should address them either directly or through incorporation by reference to an appropriate antitrust compliance policy.

#### E. DISPUTE RESOLUTION

The agreement should at a minimum address a dispute resolution mechanism between users of an electronic marketplace and management. A more sophisticated agreement may also address a dispute resolution mechanism between the buyers and sellers using an electronic marketplace. Sometimes the mechanism chosen is arbitration in a city convenient to management (for example, through the local offices of the American Arbitration Association) or in a court of law in a particular jurisdiction. If a Web site has well drafted terms and conditions, it is likely that those terms and conditions already address dispute resolution; the agreement may simply incorporate by reference from those terms and conditions.

When management anticipates an international user base (as is often the case for an Internet-based operation), it may select arbitration as the favored method of dispute resolution. It is often easier to have a U.S. arbitral award enforced by a foreign court than to have a U.S. court judgment enforced by a foreign court; this is an important consideration if (many) users of an electronic marketplace do not have a physical presence or assets in the United States. The reason for the discrepancy is that there are many signatories to an international treaty, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>43</sup> which requires enforcement of foreign arbitral awards. There is no sim-

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41. The exchange of sensitive business information between or among competitors should be handled with caution even if the purpose appears benign. See, e.g., Press Release, Dept. of Justice, Justice Department Approves Information Exchange Proposed by the Electric Power Research Institute (Oct. 2, 2000) (nonprofit energy industry organization seeks and obtains approval permitting its members to exchange information to help electric power industry protect itself against cyber-threats).

42. Additional information and antitrust guidelines are available from the U.S. Federal Trade Commission at [www.ftc.gov](http://www.ftc.gov) and the Antitrust Division of the U.S. Department of Justice at [www.usdoj.gov](http://www.usdoj.gov). The review of the Web sites of other electronic marketplaces may also be helpful. For example, Covisint has posted an antitrust compliance policy to its Web site at [www.covisint.com](http://www.covisint.com).

43. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

ilarly widely adopted international treaty requiring the recognition of foreign court judgments. The decision to select arbitration or to resort to the courts to resolve disputes will also likely depend on a number of other factors, and it is the responsibility of management to identify and then weigh these factors in selecting the most appropriate dispute resolution mechanism.<sup>44</sup>

If arbitration is selected, there are many organizations (that is, entities that have a recognized set of international arbitration rules and can provide arbitrators to settle disputes; these are referred to as *appointing authorities*) and sets of rules to which one may turn. These include, among others, tribunals and rules organized under the International Chamber of Commerce, the London Court of International Arbitration, the American Arbitration Association, the International Centre for Settlement of Investment Disputes, and the United Nations. The various systems of arbitral rules available may be further modified by contract. Selecting the most appropriate set of rules depends on the circumstances.<sup>45</sup> One general model arbitration clause that readers may find useful the following:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the [insert set of rules to be used, e.g., United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules<sup>46</sup>] as at present in force.

- a) The appointing authority shall be [name of institution or person];
- b) The number of arbitrators shall be [one or three];
- c) The place of arbitration shall be [town or country];
- d) The language(s) to be used in the arbitral proceedings shall be [list language(s)].<sup>47</sup>

Section 2 of the Federal Arbitration Act (FAA) provides that generally, arbitration clauses are valid and enforceable under the law unless there are applicable contract law exceptions that would lead the contract to be invalidated.<sup>48</sup> The FAA has been interpreted by U.S. courts as requiring them to enforce arbitration clauses when they appear in contracts.<sup>49</sup> As

44. In deciding between arbitration and trial, it is important to be mindful of the client's likely litigation posture. For a client more likely to be an infrequent defendant, it may be wise to require exclusive jurisdiction for assertion of a claim to be in nearby federal or state courts of law. Such courts will have diversity of jurisdiction, amount in controversy, and other requirements requiring a plaintiff to retain a lawyer and undergo some effort (and hopefully reflection) before asserting a claim. If the client is likely to be a frequent plaintiff (or perhaps a frequent defendant), it may be preferable to resolve disputes as informally and quickly as possible; this may suggest the use of arbitration.

Furthermore, due process and procedure are more detailed and defined in a court setting than in an arbitration. The ability to appeal a faulty court decision may be easier than the ability to appeal an arbitration ruling since, among other things, it may be harder to demonstrate a failure of due process in the arbitration.

45. For example, an electronic marketplace focusing on the sale of goods to government entities, including foreign government entities (e.g., cities, states, central government agencies), should consider whether the customers are likely to be signatories to the Convention. While there are many signatories to the convention, it is by no means a universally adopted treaty. Depending on the circumstances, management may determine that its users are developing nations, which, while not signatories of the Convention, are clients of the World Bank Group and signatories to its Convention on the Settlement of Investment Disputes between States and Nationals of Other States. That would suggest making the International Centre for Settlement of Investment Disputes the appointing authority and would call for a uniquely tailored dispute resolution clause and user consent.

46. Arbitration Rules of the United Nations Commission on International Trade Law, G.A. Res. 31/98, U.N. GOAR 31st Sess., Agenda Item 108, U.N. Doc. A/RES/3198; see also [www.uncitral.org/english/texts/arbitration/arb-rules.htm](http://www.uncitral.org/english/texts/arbitration/arb-rules.htm).

47. *Id.*

48. Federal Arbitration Act, 9 U.S.C. § 2 (1990).

a result, if arbitration is stipulated as the chosen method of dispute resolution in the agreement, it is likely to be upheld and enforced.

#### F. TERMINATION

The agreement should address how electronic marketplace members may terminate their membership or the conditions under which a user's membership may be terminated by the hosting Web site. For instance, the agreement may stipulate automatic termination of membership should a member use any auction services not included in the member's account or if a member tampers with system security to access any services for which the member is not paying. The agreement may also call for the automatic termination of membership upon the selling of illegal items or services. Details may vary, for example, depending on whether there is a fee for registering with and using the electronic marketplace. Every agreement should address the orderly termination of membership when transactions remain outstanding or offers to buy or sell remain outstanding. The electronic marketplace should have a mechanism to ensure that the offers to buy and sell that are posted on it are from members in good standing with valid registrations. It is also advisable to provide users the option of withdrawing offers to sell if no offers to buy have yet been posted.

In the event of dispute, the enforceability of termination clauses will be determined using general contract law principles. As long as a termination clause is not deemed to be unconscionable, a court will likely uphold it. Four factors are often considered in determining whether a termination clause in a disputed agreement is unconscionable: (1) whether the protesting party was deprived of meaningful choice as to whether to enter into the agreement; (2) whether the complaining party was compelled to accept the terms; (3) whether there was opportunity for meaningful negotiation; and (4) whether there was gross inequality of bargaining power.<sup>49</sup> If a dispute over the termination clause in the agreement develops between management and a member whom management is seeking to terminate, management will likely take the position that in a B2B marketplace, members are relatively sophisticated corporate entities that are able to assess contract terms and should be held to the terms of contracts to which they agreed.

## II. Consider Memorializing the Trading Rules

Even if an electronic marketplace is easy to use,<sup>51</sup> it may be helpful to memorialize the basic auction or trading rules. Such rules may state, for example, that a transaction is legally binding on the buyer and the seller once an offer is accepted and may not be unilaterally modified thereafter. Furthermore, particularly when there is a fee to join the electronic marketplace, the rules should state that only registrants may offer to buy and sell goods on the auction site. Explicit prohibitions against bad faith manipulations of price for any of

49. See, e.g., *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265 (1995); *Perry v. Thomas*, 482 U.S. 483, 493 (1987); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (a federal policy favoring arbitration is established by the FAA, which requires that courts "rigorously enforce agreements to arbitrate. . .").

50. See, e.g., *In re Estate of Frederick*, 599 P.2d 550, 556 (Wyo. 1979).

51. Ease of use issues merit being the subject of a separate article and will be a material factor in the success of an electronic marketplace. Complexity of legal issues should not be permitted to overshadow the objective of creating an electronic marketplace, which is easy to use, popular, and consequently profitable.

the goods or services offered are also recommended. A final rule that should be included is the reservation of management's right to revoke the usage privileges of any registrant(s) violating the trading rules.

If and as an electronic marketplace is upgraded, trading rules may become more complicated. By memorializing trading rules and posting them on a site, users of the electronic marketplace will know where to turn to for clear directions on how to use any new features and functions. Attaching or integrating those trading rules to or with the agreement may enhance them by providing them with authority and legitimacy.

### III. Modify Existing User Agreements or Create a New One?

Management will likely wish to keep the need for contracts and legal agreements between itself and its users to a minimum. Legal counsel may be asked whether existing site agreements are sufficient to address liability issues raised by an electronic marketplace or whether those agreements could be modified. The answer to this question, of course, depends on how the existing agreements are drafted.<sup>52</sup> Often, a site will have a general terms and conditions page setting forth the terms and conditions with which the public may use the site and a privacy policy page. In deciding whether to use existing agreements, modify existing agreements to address the points raised in parts I and II presented earlier, or draft a new agreement to accommodate the new electronic marketplace, legal counsel should bear in mind who will have access to an auction site. The three broad possibilities are the general public, all registered users of the Web site, or only those specifically registering with an electronic marketplace.

One of the easiest ways to limit liability for interaction with non-registered users (meaning not registered with either the Web site or its electronic marketplace if there is separate registration) is restricting access of an electronic marketplace to registered users.<sup>53</sup> Non-registered users may be permitted to review some or all of the auctions offered but denied the rights to participate (that is, offer to buy or sell) in the electronic marketplace. Registration is a time-consuming process; someone willing to devote the time to register is more likely to be a responsible user of the service. As a practical matter, not all the registered users of a Web site may want to use the auction services. If all registered users of the Web

52. When agreements are electronic in nature, which is generally the case, users should have to demonstrate affirmative intent to be bound by contract. Many Web sites simply post agreements that include a term stating something to the effect that use of the site constitutes acceptance of the agreement. Whether such term will be found enforceable depends on the circumstances. A sophisticated Web-based agreement should require the user to enter their name or a phrase such as "I accept" or at a minimum click on a radio button to indicate an intent to be bound (either there should be no default selection or the default should be something other than acceptance). This proof of intent to contract should be stored away for future retrieval in the event a question is ever raised about whether a particular user indicated assent to be bound by the agreement. Care should be taken to ensure that these records are not erased inadvertently as part of a periodic document destruction policy. The level of precaution taken should be commensurate to the economic value of each agreement.

53. This analysis presumes that users of the Web site must register with the site. Most business Web sites, whether they cater to other businesses or to consumers, encourage or require registration with the site to fully utilize all the features of the site. Aside from the commercial/business reasons why requiring registration is advisable, there are legal reasons to require registration. Part of the registration process should include the display of the site's terms of use (and depending upon the nature of the site, perhaps its privacy policy as well) and require some affirmative indication that the user reviewed and agrees to those terms.

site shall have access to the electronic marketplace, it makes sense to modify the Web site's existing terms and conditions to incorporate the electronic marketplace elements. If separate registration is necessary anyway (for example, if an additional access or membership fee must be paid to use the electronic marketplace), it may be more suitable to draft a new set of terms and conditions specifically for electronic marketplace members.

#### **IV. Conclusion**

In the current market environment, management of many Internet-based businesses continue to plan and execute at an accelerated pace and on a minimum budget. Businesses that establish electronic marketplaces should ensure that there is an enforceable agreement between the marketplaces and their users. The agreement should remove an electronic marketplace and its managers along with any parent company from liability for the transactions occurring on or through the electronic marketplace. Management should disclaim commitment for the electronic marketplace to be available and functioning for any period of time. The agreement should further insulate management by obtaining commitments from registrants to be aware of and compliant with applicable law. In particular, export control, trade sanctions, taxation and, potentially, antitrust laws will impact the international trade of goods and services on an electronic marketplace.

The agreement should provide management with some marketing and advertising flexibility, which may include some use of registrant trademarks and some permissible use of registrants' transactions data. It should also have an effective and efficient dispute resolution mechanism; arbitration may be the preferred mechanism if the majority of trading is expected to be international. A practical termination clause that preserves management's flexibility and control in terminating undesirable registrants is also essential. Finally, the agreement may seek to incorporate trading rules or compliance policies pertaining to antitrust, privacy, or other matters. The more sophisticated the agreement, the more likely it will be a stand-alone document between an electronic marketplace and its users. When budget and other considerations make creation of a separate contract undesirable, existing agreements between a Web site and its users should be modified to address the issues that are unique to an electronic marketplace.